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No. 02-566

In The
Supreme Court of the United States

CAROL HARLEY, *et al.*,

Petitioners,

v.

3M COMPANY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE PENSION RIGHTS CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURAIE*

The Pension Rights Center submits this brief *amicus curiae* in support of the petition filed in No. 02-566 by Carol Harley, *et al.* for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Written consent to file this brief has been obtained from the parties and their letters have been filed with the Clerk of the Court pursuant to Rule 37.2(b) of the Rules of this Court.

INTEREST OF *AMICUS CURIAE*[1]

Established in 1976, after the enactment of the Employee Retirement Income Security Act ("ERISA"), the Pension Rights Center is a Washington, D.C. non-profit, consumer organization which has as its mission the protection and promotion of the pension rights of workers, retirees and their families. For the past 26 years, the Center has provided legal representation, informal assistance, and information to tens of thousands of pension plan participants and beneficiaries seeking to recover benefits and ensure that their plans are prudently managed. The Center's ability to help employees and retirees enforce their rights will be impaired by the resolution of the first question presented in the petition.

[1] Pursuant to Rule 37.6 of the Rules of this Court, the Center states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Eighth Circuit held, in essence, that in enacting ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), Congress violated Article III's case-or-controversy requirement by authorizing defined benefit plan participants, on behalf of their plan, to sue their plan's fiduciaries for breach of fiduciary duty without requiring the participants to also plead and prove "the absence of a substantial surplus" such that the harms caused by the breach pose an immediate threat to their guaranteed benefits. Pet. App. A, 12a. As the petition explains, in concluding that pension plan participants have standing only when they can prove "the absence of a substantial surplus," the Eighth Circuit misapplied this Court's Article III precedents, rejected the considered views of both the Secretary of Labor and the Pension Benefit Guaranty Corporation ("PBGC"), and ignored the decisions of three other Circuits (the Second, Ninth and Fourth) that have concluded that Congress was well within its authority in conferring standing upon pension plan participants to sue breaching plan fiduciaries on behalf of their plan without regard to the plan's then-current funding status. Unless certiorari is granted, the Eighth Circuit's ruling is certain to undermine effective enforcement of ERISA. As we will show, the Eighth Circuit's decision is wrong on the merits, misunderstands the nature of a "surplus" in an ongoing pension plan, and would prevent most participant-filed pension lawsuits from ever being brought or prosecuted to a decision on the merits. This result is contrary to the scheme established by Congress, and against the public interest.

I. There is no Article III bar to Congress's express and unqualified grant of standing to pension plan participants to sue for breach of fiduciary duty without also

showing their plan lacks a substantial surplus. Petitioners have demonstrated a sufficient injury-in-fact to their economic interests by showing that the losses to their pension plan caused by the alleged fiduciary breaches have diminished the security of their guaranteed benefits and hurt their chances of obtaining an increase of benefits. Petitioners thus have the requisite "personal stake," *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 395-397 (1980), in prosecuting their case and recovering $80 million for their plan. Petitioners have also demonstrated a sufficient injury-in-fact by alleging an invasion of the statutorily-created right to have their pension plan administered in conformity with the statute's strict fiduciary duties and prohibited transaction protections. *Warth v. Seldin,* 422 U.S. 490, 500 (1975) ("the . . . injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'") (*citing Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973)).

II. The Eighth Circuit misunderstood the nature of a "surplus" in an ongoing pension plan. Unless and until a plan is terminated and its liabilities fixed, there is no "surplus," properly speaking. A definite surplus exists only when a plan is terminated with more than enough assets to satisfy all benefit liabilities. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1). The funded ratio of an ongoing plan is no more than an estimate of whether, at that moment in time, actuarial liability fairly attributable to work already performed has been funded. This snapshot not only fails to capture the ability of a plan to pay benefits in the future or on termination, it is based on a multitude of actuarial assumptions, any one of which, if inaccurate, could swing a seemingly overfunded plan to underfunded status in

short order. In the past two years, as equity prices have plummeted (depressing plan asset values) and interest rates have fallen to their lowest rates in recent years (increasing the discounted present value of plan liabilities), so-called "surpluses" have been erased and many corporate pension plans are now significantly underfunded. As the petition illustrates, based on the Company's own admission even the 3M Plan is now underfunded. Pet. at 24 & n.6. In short, in an ongoing plan, a "surplus" is a transitory phenomenon that should have no relevance to plan participants' right to sue to enforce compliance with the Act's requirements.

III. Making pension plan participant standing dependent upon a showing of "the absence of a substantial surplus" will prevent most private fiduciary breach cases from ever being brought, despite the fact that private suits were a key part of the enforcement scheme created by Congress and are a necessary supplement to actions brought by the Secretary of Labor. Under the Eighth Circuit's decision only the most intrepid of plaintiffs or those in chronically underfunded plans will bring suit since their case may be dismissed for lack of standing at any time. Even then, disputes over which funding methodology is appropriate to employ to measure underfunding (the Eighth Circuit gave little guidance on the matter and the District Court considered no fewer than five different methods) will consume scarce judicial resources and preoccupy the parties. Additionally, in some cases the statute of limitations will have run before the plan becomes sufficiently underfunded to permit suit to be filed. In sum, the Eighth Circuit's "absence of a substantial surplus" rule is inadministrable and will substantially interfere with the effective enforcement of the statute. The

petition for a writ of certiorari should be granted and the judgment of the Eighth Circuit reversed.

ARGUMENT

I. ARTICLE III DOES NOT BAR CONGRESS'S DECISION TO GIVE PENSION PLAN PARTICIPANTS STANDING TO BRING SUIT FOR BREACH OF FIDUCIARY DUTY WITHOUT ALSO REQUIRING A SHOWING THAT THEIR PLAN LACKS A SUBSTANTIAL SURPLUS.

Article III limits the judicial power of federal courts to "Cases" and "Controversies." Art. III, § 2. That requirement serves both to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and "to assure that the federal courts will not intrude into areas committed to the other branches of government." *Flast v. Cohen,* 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the standing doctrine. To have standing, plaintiffs must show "an injury in fact" that is "causally connected" to the challenged conduct and would "likely" be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

The court below found that petitioners did not suffer an injury-in-fact when they alleged that their plan's fiduciaries had cost the plan some $80 million in losses by initiating and maintaining a large investment in a risky hedge fund because "the Plan's surplus was sufficiently large that the [hedge fund] investment loss did not cause actual injury to plaintiffs' interests in the Plan." Pet. App.

A, 11a.[2] However, the Eighth Circuit overlooked petitioners' very real financial interest in their plan having more rather than less assets available to pay benefits (including possibly increased benefits). The Court of Appeals also failed to recognize that petitioners have standing by virtue of Congress's creation of ERISA-imposed statutory rights to have their plans administered in accordance with the statute's strict fiduciary duties and prohibited transaction protections, the invasion of which creates a cognizable injury-in-fact.

A. There is no question that in broadly granting any single plan participant or beneficiary the right to sue on behalf of their plans to redress violations of the statute, for damages, disgorgement of ill-gotten gains and injunctive relief, *see* ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), and without regard to her plan's funding status, Congress intended to confer participant and beneficiary standing to its full constitutional limit. *See, e.g., Gollust v. Mendell,* 501 U.S. 115, 122 (1991) ("the statutory definitions identifying the class of plaintiffs . . . who may bring suit indicate that Congress intended to grant enforcement standing of considerable breadth"). Although petitioners can point to no imminent threat to their guaranteed benefits and have no direct or reversionary claim on the plan's assets, *see Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438-41

[2] There was no dispute below that the other two factors necessary to establish standing are present in this case. There is a causal connection between the alleged fiduciary breaches and the losses to the plan. Moreover, the injury to the plan and, indirectly, to participants, will be redressed under the mandatory relief provisions of ERISA § 409, 29 U.S.C. § 1109, by an order requiring the allegedly breaching fiduciaries to make good the losses to the plan.

(1999), they nevertheless have a financial interest in seeing their plan recover the $80 million it lost on this allegedly imprudent investment sufficient to establish an Article III injury-in-fact. Pension benefits backed by an additional $80 million in assets are unquestionably worth more than benefits without such backing. The risk that a plan participant will not be paid vested benefits owed to her – by the plan which may be underfunded by the time she retires; by her employer who may be bankrupt by the time she retires; or by the PBGC that does not guarantee all plan benefits, ERISA § 4022(b)(3), 29 U.S.C. § 1322(b)(3); 29 C.F.R. § 4022.21(c)(1) – is more than sufficient to give the participant "'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.'" *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 804 (1985) (quoting *Baker v. Carr,* 369 U.S. 186, 204 (1962)).

Moreover, the Eighth Circuit overlooked a separate financial interest sufficient to confer participants with Article III standing that they have in recovering the $80 million which the plan's fiduciaries lost through alleged imprudence; recovering plan losses improves the chances that the plan's sponsor will sometime in the future increase benefits, such as through a change in the plan's formula or a cost-of-living adjustment. *See* USGAO, PENSION COLAs (1995). No matter how well-funded a plan may seem to be at a given time (and, ironically, this plan has since become indisputably underfunded), an $80 million loss is certainly a blow to participants' chances of receiving richer benefits and a cognizable injury-in-fact for Article III purposes.

Under this Court's decision in *Gollust, supra,* it is clear that petitioners' financial interest in having greater

security for their guaranteed benefits and increasing the likelihood that those benefits will be enhanced to account for cost of living increases gives them a sufficient, concrete stake in the outcome of the litigation to satisfy Article III. In *Gollust,* the Court found no Article III bar to Congress's decision, through Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), to confer standing upon owners of securities to sue on behalf of the issuers to recover short-swing trading profits made by insiders where the plaintiff's financial interest was "indirect" "since any recovery will inure only to the issuer's benefit," *Gollust*, 501 U.S. at 127, and even where the plaintiff's stock in the issuer had been exchanged for stock in the issuer's new corporate parent. *Id.* Although the plaintiff's financial stake in the suit's outcome was both "indirect" and "attenuated," the unanimous Court had no trouble finding that the plaintiff had the requisite "personal stake" in the outcome, even if he held just one share of stock in the issuer's new corporate parent. *Id.*

Significantly, the Court noted that even *a bondholder's* financial interest in a potential recovery for the issuer was also sufficient to confer standing, even though, as the Court noted, the bondholder's interest is "even more attenuated" than the stockholding plaintiff's "since any recovery by the issuer will increase the value of the bond only because the issuer may become a slightly better credit risk." *Id.* Here, although petitioners' interest is indirect and attenuated, there is standing because a recovery for the plan will increase the value of petitioners' guaranteed benefits by increasing their security and increasing the

likelihood that the plan will pay them additional benefits. No more is required for Article III standing.[3]

B. The Eighth Circuit's analysis also fails to recognize the injury-in-fact to petitioners' statutorily-created rights to have their pension plan administered in conformity with the statute's strict fiduciary duties and prohibited transaction protections. This Court has long recognized that Congress may by statute articulate interests and elevate the status of injuries that otherwise would not be sufficient for Article III purposes. *See Defenders of Wildlife,* 504 U.S. at 577. Although Congress "may not confer jurisdiction on Art. III federal courts to render advisory opinions, . . . or to entertain 'friendly' suits, . . . or to resolve 'political questions,' . . . because suits of this character are inconsistent with the judicial function under Art. III," Congress may create legally protected interests not present at common law, which in turn give rise to standing. *Sierra Club v. Morton,* 405 U.S. 727, 732 n.3 (1972). ERISA is an example of where "the . . .

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[3] *Cf. Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 181-85 (2000) (documented concerns about the effects of pollutant discharge directly affecting plaintiffs' recreational, aesthetic and economic interests sufficient to show injury-in-fact); *Department of Commerce v. U.S. House of Representatives,* 525 U.S. 316, 323 (1999) (Indiana resident had standing to challenge Census Act on the ground that challenged procedures would likely result in decrease in the number of Indiana House members, thus diluting resident's vote); *Clinton v. City of New York,* 524 U.S. 417, 432 (1998) (potato growers showed "a sufficient likelihood of economic injury to establish standing" to challenge the Line Item Veto Act where President line item vetoed a provision giving sellers of potato processing plants favorable tax treatment; provision would have resulted in greater willingness to sell the plants to plaintiff, making them more cost-efficient and self-sufficient).

injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Warth v. Seldin,* 422 U.S. at 500 (citing *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 n.3 (1973)).

One of ERISA's overriding goals was the prevention of the misuse or mismanagement of plan assets by fiduciaries. *Massachusetts Mutual Life Ins. Co. v Russell,* 473 U.S. 134, 140-43 & n.8 (1985). Declaring as its policy the protection of "the interests of participants in employee benefit plans and their beneficiaries," ERISA § 2(b), 29 U.S.C. § 1001(b), the statute expressly gives plan participants and beneficiaries the right to have their plans administered in accordance with the statute's strict fiduciary duties and prohibited transaction protections. *See* ERISA §§ 404(a), 406(a)-(b), 29 U.S.C. §§ 1104(a), 406(a)-(b); *see also Boggs v. Boggs,* 520 U.S. 833, 845 (1997) ("The principal object of the statute is to protect plan participants and beneficiaries."); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90 (1983) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans"). The invasion of these ERISA-imposed rights to a prudently and loyally managed plan as alleged by petitioners is clearly sufficient to establish constitutional standing. *See also Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373 (1982) (holding that "testers" had standing to sue persons who provided false information in violation of the Fair Housing Act); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U. L. Rev. 881, 885 (1983) ("legal injury is by definition no more than the violation of a legal right; and legal rights can be created by the legislature").

Even though petitioners may lack a direct or reversionary claim on the plan's assets, they can in no way be likened to "stranger[s] to the plan." Pet. App., 9a. To the contrary, it is precisely for their benefit that the plan and trust exist. This is obviously not a case in which Congress sought to bestow upon the general public a right to enforce the statute's dictates, in which case significant Article III concerns might be raised. *See Defenders of Wildlife,* 504 U.S. at 573-78. Rather, Congress carefully delineated the class of litigants empowered to protect the integrity of ERISA-governed plans. Only "the Secretary, or . . . a participant, beneficiary or fiduciary" may bring suit to redress a violation of the Act. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). There is thus no Article III bar to Congress's decision to confer standing on pension plan participants such as petitioners, without requiring them to show, in addition to a breach of fiduciary duty resulting in an undisputed loss to the plan, "the absence of a substantial surplus" or an immediate threat to their guaranteed benefits.

II. A "SURPLUS" IN AN ONGOING PENSION PLAN IS A TRANSITORY PHENOMENON THAT SHOULD HAVE NO BEARING ON A PARTICIPANT'S RIGHT TO SUE FOR BREACH OF FIDUCIARY DUTY.

A "surplus" in an ongoing pension plan is an actuarial construct that should have no bearing on a participant's right to sue on behalf of his plan for breach of fiduciary duty. Unless and until a plan is terminated and its liabilities fixed, there is no "surplus," properly speaking. A definite surplus exists only when a plan is terminated

with more than enough assets to satisfy all benefit liabilities. ERISA § 4044(d)(1), 29 U.S.C. § 1344(d)(1); *Shepley v. New Coleman Holdings, Inc.*, 174 F.3d 65, 70 (2d Cir. 1999) ("the fact of a surplus or deficit, and its amount, can only be determined in hindsight").

By contrast, when an actuary determines the ratio of a plan's assets to its actuarial liabilities (the "funded ratio"), the actuary is merely using an actuarial cost method to compare, "sometimes imprecisely," the part of future benefit costs attributable to the past to then current plan assets. McGill, et al., *Fundamentals of Private Pensions*, 520-521 (7th ed. 1996). Even in a fully funded plan, benefits which will accrue in the future, so-called "future normal costs" need not be funded. *Id.* Thus, to say that a plan has more assets than actuarial liability, while significant to determine a plan's minimum funding obligations, does not mean that the plan has assets estimated to be sufficient to pay projected liabilities. Nor does it mean that the plan has sufficient assets to pay benefits if terminated immediately. The district court found in this case that on a termination basis 3M's assets fell short of its liabilities. App. B at 29a.

Moreover, to determine that a plan is fully funded, actuaries must make numerous assumptions about the rate of return on invested plan assets, mortality rates, future compensation increases, length of service to retirement and the like. Actuaries have considerable discretion in setting or changing these assumptions, and the Eighth Circuit's rule will give employers and their actuaries an incentive to manipulate these assumptions in order to immunize the plan fiduciaries from suit. Even in the absence of purposeful manipulation, a plan can rapidly go from overfunded to underfunded with a change in one or

more of the underlying assumptions, or the failure of a plan's actual experience to match the actuarial assumptions. *See* USGAO, PENSION PLANS: HIDDEN LIABILITIES INCREASE CLAIMS AGAINST GOVERNMENT INSURANCE PROGRAM 18-34 (1992).

An ongoing plan's funded ratio is particularly sensitive to changes in interest rates, and companies using higher discount rates could be understating their actuarial liability. Companies use a discount rate when estimating the present value of their long-term obligations: estimated liabilities are projected by discounting the prospective benefit payments at the rates at which they can be effectively settled by purchase of an annuity from a reputable issuer. *See Impact of Discount Rates on Pension Plans for 2001*, Credit Suisse Asset Management (2001). Pension liabilities are thus inversely related to interest rates – *i.e.*, a lower discount rate means higher liabilities. *Id.* A one percent drop in interest rates could lower a plan's funding level by over 15 percent. *Removing Pension Assets: Risks to Retirees and the Federal Pension Insurance Program* at 10 (PBGC, Sept. 27, 1995). In the past few years, falling interest rates have significantly raised the discounted present value of pension liabilities, contributing significantly to the disappearance of many plan "surpluses." In previous market downturns, declines in equity share prices were offset by an increase in interest rates. Not so this time.

Indeed, according to Milliman USA, in just the last two years, 50 of the nation's biggest companies have lost more than 90 percent of their combined pension surpluses. Mark Schwanhausser, *Market Taking Toll on Pension Income*, San Jose Mercury News, Sept. 29, 2002. In June

2002, the PBGC reported to Congress that the underfunding of private pension plans increased by 425% from the end of 2000 (underfunding of $26 billion) to the end of 2001 (underfunding of $111 billion). *See* Sue Kirchhoff, *Pension Underfunding Soars 425% $111 Billion Shortfall is Record High*, The Boston Globe, July 26, 2002. Watson Wyatt Worldwide similarly estimated that, of the 500 companies it surveyed, more than half went from an overfunded to underfunded status in just one year. *See* James P. Miller, *Pension Plans Lose Ground as Stocks Fall*, Chicago Tribune, July 21, 2002. A recent Merrill Lynch report, focusing on the roughly 350 companies in the Standard & Poor's 500-stock index having defined benefit pension plans, found that these plans went from being overfunded by $215 billion at the end of 2000 to underfunded by $640 billion at the end of 2002. *See* Danielle DiMartino and Pamela Yip, *Companies Face Pinch on Pensions; Making Up for Underfunding Will Drain Cash, Probably Drag Stocks*, Dallas Morning News, September 29, 2002.

In such circumstances, it makes little sense to make the enforcement rights of pension plan participants depend on fortuities of temporary, actuarial artifices or the vagaries of the market. The instant case is example enough: three weeks after rehearing was denied, 3M's CFO acknowledged that its plan is now underfunded. *See* David Henry, *The New Pinch from Pensions*, Business Week, Aug. 5, 2002 at 44-46; *see also* Pet. at 24 & n.6. Last month, 3M announced that it is pursuing *a five-year* plan to make up the new funding shortfall. *See* Event Brief of Q3 2002 3M CO Earnings Conference Call – Final, FD Wire (Oct. 21, 2002).

III. REWRITING THE STATUTE TO REQUIRE PENSION PLAN PARTICIPANTS TO MAKE A SHOWING OF "THE ABSENCE OF A SUBSTANTIAL SURPLUS" AS A PREREQUISITE TO FILING AND MAINTAINING SUIT WILL UNDERMINE EFFECTIVE ENFORCEMENT OF THE STATUTE.

Requiring pension plan participants to make a "no surplus" showing in order to file and maintain their suit will have ruinous effects on participants' ability to enforce their rights to the prudent and loyal management of their pension plans. Few private plaintiffs will be able to afford to bring suit to vindicate those rights if their case may be dismissed at any time for lack of standing due to the temporary emergence of a supposed "surplus" in their plan. In all but the most chronically underfunded plans, private litigants will be deterred from filing suit, knowing that draining, complex disputes over the plan's funding status are likely to devolve into mini-trials of actuarial minutiae.[4]

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[4] The Eighth Circuit gave little or no guidance on how in future cases participants are supposed to plead and prove "the absence of a substantial surplus." Pet. App. A, 11a. The Eighth Circuit said only what was *not* a proper measure of such an absence. The Eighth Circuit said that unless participants could show the plan was about to terminate, they could not establish standing by pointing out that the plan was not fully funded according to ERISA-mandated termination basis methodology, *see* 29 U.S.C. §§ 1058, 1344; 29 C.F.R. §§ 4044.41-75. Pet. App. A, 12a. Second, the court also said it was not sufficient to show that the plan was not fully funded according to "RPA 94" (Retirement Protection Act of 1994) current liability methodology, *see* 29 U.S.C. § 1082(d), on the grounds that ERISA "does not use that funding level to determine whether additional contributions are required, and 3M has never been required to make an additional contribution." Pet. App.

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The Eighth Circuit's ruling would effectively remove one of the three legs upon which the enforcement of the statute stands. To ensure effective enforcement of the statute's strict fiduciary duties and prohibited transaction protections, Congress sensibly chose to rely on the Secretary of Labor, plan fiduciaries *and* participants and beneficiaries. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Indeed, to ensure "ready access to the Federal courts," ERISA § 2(b), 29 U.S.C. § 1001(b), Congress provided that a single participant or a single beneficiary may maintain an action on behalf of his plan, and need not seek the approval of the Secretary, the plan's fiduciaries or his employer before bringing suit. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). *See Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1461-64 (9th Cir. 1995) (although in the nature of a derivative action, fiduciary breach suits on behalf of plan may be maintained without first complying with Fed. R. Civ. P. 23.1).

It is thus clear that "Congress intended to grant enforcement standing of considerable breadth," *Gollust*, 501 U.S. at 122, to plan participants and beneficiaries, recognizing the limited ability of the Secretary of Labor to police tens of thousands of private pension plans and the inability of plan fiduciaries to sue themselves or their close

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A at 12a. The Eighth Circuit seemed to suggest that participants would have standing if they could allege and prove that the actuarial value of the plan's actuarial accrued liabilities exceeded the value of plan assets, but it did not indicate what methodologies it would accept to measure either factor, or whether it was sufficient to show such a shortfall at the time the alleged breach occurred – or at the time the complaint was filed – or whether participants would have to make such a showing at every stage of the litigation. *Id.*

associates when their actions or inactions were at issue. *See* H.R. Conf. Rep. No. 101-386, 1989 U.S.C.C.A.N. 3018, 3035 (noting, in adding civil penalty to the statute, the insufficiency of the Secretary's resources to fully protect pension plans); Dept. of Labor Amicus Br. Supporting Pet. for Reh'g at 10 ("[b]ecause of limited resources . . . and the vast number of pension plans . . . the Department must often rely on private plaintiffs to vindicate their own rights").

According to the PBGC, there are today some 35,000 ERISA-governed, defined benefit pension plans covering approximately 44 million workers or retirees. *See About PBGC* at http://www.pbgc.gov/about (last visited Nov. 13, 2002). Knowledgeable observers have estimated that fiduciary breaches of one sort or another have occurred in as many as 25% of all plans. *See, e.g.,* USGAO, PENSION PLANS: FIDUCIARY VIOLATIONS IN TERMINATED UNDERFUNDED PLANS 1 (1991) (finding "[f]iduciaries' fund abuses . . . in over 25 percent" of plans reviewed). The Secretary of Labor cannot effectively police all these breaches single-handed. *Cf.* USGAO, PENSION AND WELFARE BENEFITS ADMINISTRATION: OPPORTUNITIES EXIST FOR IMPROVING MANAGEMENT OF ENFORCEMENT PROGRAM 2-3 (2002) (outlining continued weaknesses in the Labor Department's enforcement program).

Thus, in conferring standing upon participants to bring fiduciary breach suits on behalf of their plans, Congress did not distinguish between plans which were then fully funded or not then fully funded (however measured). *See Financial Institutions Retirement Fund v. Office of Thrift Supervision,* 964 F.2d 142, 147-49 (2d Cir. 1992) (employees transferred from one fully-funded plan to another fully-funded plan had standing to bring ERISA

fiduciary breach claims seeking to have certain surplus credits "follow" them into the new plan); *Brink v. DaLesio,* 667 F.2d 420, 427-28 (4th Cir. 1981) (participant had standing to sue on behalf of an apparently fully-funded health and welfare plan for losses caused by ERISA fiduciary breaches); *Olsen v. Hegarty,* 180 F. Supp. 2d 552, 562-64 (D.N.J. 2001) (participant had standing to sue on behalf of fully-funded pension plan for losses caused by ERISA fiduciary breaches).

Further evidencing Congress's purposeful reliance on private plaintiffs to enforce the statute's command, ERISA does not limit participant suits against fiduciaries to those just seeking to recover monetary "losses" caused by fiduciary breaches. ERISA § 409(a), 29 U.S.C. § 1109(a). Rather, it gave participants standing to sue as well to force breaching fiduciaries to disgorge all profits they made through the misuse of plan assets, whether that misuse caused a plan loss or not and without regard to the plan's then-current funding status. *Id.* (fiduciaries liable "to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary"). *See Amalgamated Clothing & Textile Workers Union v. Murdock,* 861 F.2d 1406, 1410-19 (9th Cir. 1988) (participants have standing to sue on behalf of their terminated plan for breach of fiduciary duty to recover ill-gotten gains even after they have received all benefits to which they were entitled); *Leigh v. Engle,* 727 F.2d 113, 122 (7th Cir. 1984) ("If ERISA fiduciaries breach their duties by risking trust assets for their own purposes, beneficiaries may recover the fiduciaries' profits made by misuse of the plan's assets").

Again without regard to whether the plan had suffered a loss or was then-currently underfunded, Congress

also gave participants standing to sue on behalf of a plan to obtain "other equitable and remedial relief . . . including removal of [breaching] fiduciary[ies]," ERISA § 409(a), 29 U.S.C. § 1109(a), to ensure compliance with fiduciary and prohibited transaction rules. Thus, Congress authorized participants, for example, to seek injunctive relief to prevent or to end risky investment schemes of which they became aware or to remove imprudent or disloyal fiduciaries before they could harm the plan. *See Drolet v. Healthsource, Inc.*, 968 F. Supp. 757, 759-760 (D.N.H. 1997) (participant had standing to obtain an injunction against alleged fiduciary misrepresentations without having to make a showing of financial harm).

This carefully crafted enforcement scheme, at least as regards defined benefit plans and perhaps any other type of plan (such as health and welfare plans) as to which participants cannot make a direct or reversionary claim to plan assets, will be all but scuttled if the Eighth Circuit's "no surplus" requirement is allowed to take root.

The Eighth Circuit's rule also creates the likelihood that meritorious cases may be barred due to the running of the statute of limitations. ERISA's statute of limitations generally begins to run from either the date the breach occurred or the date the plaintiff acquired knowledge of the breach. ERISA § 413, 29 U.S.C. § 1113. It is well-established that a loss need not occur before the statute of limitations begins to run. *E.g., Larson v. Northrop Corp.*, 21 F.3d 1164, 1170 (D.C. Cir. 1994). Yet under the Eighth Circuit's ruling, suit cannot be brought until the plan is underfunded, meaning in some circumstances participants will be time-barred from bringing suit, even if it is the very breach that participants wish to raise that later led to the underfunding. Such results are not far-fetched under

the Court of Appeals' decision, and provide further evidence that it should not be permitted to stand.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted and the judgment of the Eighth Circuit reversed.

Respectfully submitted,

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